

COYOTE CREEK MINING COMPANY, L.L.C.

A SUBSIDIARY OF THE NORTH AMERICAN COAL CORPORATION

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February 13, 2013

Mr. Terry O'Clair
Director, Division of Air Quality
North Dakota Department of Health
918 East Divide Avenue
Bismarck, ND 58501-1947

RE: Coyote Creek Mining Company, L.L.C.'s Proposed Lignite Mine, Separate Stationary Source Determination Request

Dear Mr. O'Clair:

Coyote Creek Mining Company, L.L.C. (CCMC) respectfully requests a stationary source determination from the North Dakota Department of Health (NDDH) regarding its proposed lignite mine, Coyote Creek Mine (CCM). This submittal describes the proposed operations at the CCM and requests an express determination from the NDDH that the proposed mine is a separate "stationary source" from the Coyote Station electric generating plant under Prevention of Significant Deterioration (PSD) rules, Section 112 of the Clean Air Act (CAA) for hazardous air pollutants (HAP), and Title V (Part 70) rules. These Federal programs are incorporated into the North Dakota Air Pollution Control Rules under Chapters 33-15-15, 33-15-22, and 33-15-14, respectively.

Executive Summary

CCMC has evaluated the applicable regulations and corresponding criteria of the aforementioned CAA programs in determining the stationary source status of the proposed CCM in relationship to the existing Coyote Station. The implementing regulations require that a stationary source, or group of stationary sources, that are located within a contiguous area and under common control be considered together for purposes of determining if the combined HAP emissions meet major source thresholds.¹ Major source determinations under the PSD and Title V programs also require that sources be aggregated on the basis of the same industrial grouping as determined by the two-digit major group Standard Industrial Classification (SIC) code.² These three criteria (contiguous or adjacent property, common control, industrial grouping) are applied to pollutant-emitting activities at the CCM and Coyote Station. Both of the first two criteria must be met for purposes of aggregating HAP emissions under Section 112. All three criteria must be met for the pollutant-emitting activities to be aggregated for PSD applicability purposes.

¹ See definition of "major source" under Section 112(a)(1) of the CAA as promulgated at 40 CFR § 63.2.

² See definition of "major source" at 40 CFR §70.2 and at NDAC 33-15-14-06.1.q. for the Title V operating permit program. See also definition of "building, structure, facility, or installation" at 40 CFR § 52.21(b)(6) as referenced in NDAC 33-15-15-01.2. Herein, references to PSD rules will be denoted from the EPA regulations at 40 CFR § 52.21.

CCMC will be conducting its mining operations at a distance of at least 3 miles from Coyote Station. The CCM and Coyote Station are separately owned and are under separate control. Further, each facility will operate under a different major group SIC code. Under applicable law, the CCM and Coyote Station should be regarded as separate stationary sources for CAA purposes.

Description of Proposed Coyote Creek Mine

The CCM shall be designed as a surface mining operation with annual production of approximately 2.5 million tons of lignite for sale. The primary mining operations are proposed to occur in a 13-square-mile area located 3 to 4 miles southwest of Coyote Station and west-southwest of Dakota Westmoreland's existing Beulah Mine. See Attachment 1 for the relative locations of these facilities and their operating activities.

Construction activities at the mine, primarily with respect to the dragline, are scheduled to begin in 2014. Commercial delivery of lignite is scheduled to begin by May 2016 under a lignite sales agreement with the Coyote Station owners. The 25-year sales agreement provides for lignite delivery through 2040 with opportunity for extension. The sales agreement is described further below as relevant to the stationary source regulatory criteria.

Separate Stationary Source Determination

Under Federal and North Dakota PSD regulations, a "stationary source" is defined as "any building, structure, facility or installation which emits or may emit a regulated NSR pollutant."³ "Building, structure, facility or installation" is defined as "all of the pollutant-emitting activities which belong to the same industrial grouping, are located on one or more contiguous or adjacent properties, and are under the control of the same person (or persons under common control) . . ."⁴ If the pollutant-emitting activities fail to satisfy any one of the three criteria, they are considered separate stationary sources and their emissions cannot be aggregated for PSD applicability purposes.

Common Control

Common control is not explicitly defined by NDDH or EPA; however, the most common and clearest understanding of the common control criterion is by common ownership, consistent with the intent of the PSD rules. As described in this section, CCMC and the owners of Coyote Station are completely separate, and there is no shared equity position between the two ownership groups.

The EPA has made a determination in a situation very similar to the one here. In the late 1990's, the Mississippi Lignite Mining Company, which is owned by the same parent company as CCMC, constructed a new lignite mine (Red Hills Mine) to be the exclusive fuel provider to an adjacent power plant separately owned and operated by Choctaw Generation, LLP. The lignite from Red Hills Mine was being provided under a 30-year lignite sales agreement. The EPA acknowledged that the mine and power plant are separate sources for PSD applicability purposes because of separate ownership and separate

³ 40 CFR § 52.21(b)(5).

⁴ 40 CFR § 52.21(b)(6).

control.⁵ A copy of the EPA's letter is Attachment 2. The EPA deemed the mine's pollutant-emitting activities to be "secondary emissions" to those of the power plant. Secondary emissions are defined as:

...emissions which would occur as a result of the construction or operation of a major stationary source or major modification, but do not come from the major stationary source or major modification itself. Secondary emissions include emissions from any offsite support facility which would not be constructed or increase its emissions except as a result of the construction or operation of the major stationary source or major modification.⁶

Secondary emissions do not count in determining the potential to emit of a stationary source for applicability purposes, but rather are considered in a source impact analysis for proposed sources or modifications that are subject to PSD.⁷

In addition to common ownership, we understand that the EPA has identified a number of additional factors that it considers relevant to the common control issue. These factors emanate from EPA guidance memoranda and court cases rather than in regulations subject to public notice and comment. As the primacy agency, the NDDH has the discretion to apply them in a given situation. Three key EPA memoranda are normally referenced for these factors: a September 18, 1995 Response from William A. Spratlin to Iowa Department of Natural Resources; an August 2, 1996 Memorandum from John S. Seitz; and, an October 1, 1999 Response from Richard Long to Colorado Department of Public Health Environment. In these memoranda, the EPA has determined that common control relationships can possibly be established through both direct control (e.g., ownership or subsidiaries) or indirect control (e.g., contractual or leasing agreements) depending on the support/dependency relationships (i.e, one would not exist "but for" the other).

Below we have summarized these functional factors generally used to determine common control, along with a description of the relationship between CCMC and Coyote Station.

1. *Common control can be established through ownership (i.e., same parent company or a subsidiary of the parent company).* There is no common ownership or equity position between any of these companies with respect to CCMC or Coyote Station. CCMC is a wholly-owned subsidiary of The North American Coal Corporation, which is a wholly-owned subsidiary of NACCO Industries, Inc., a publicly-traded company in Cleveland, Ohio. Coyote Station is owned, as tenants in common, by Otter Tail Power Company, Montana-Dakota Utilities Co., Northern Municipal Power Agency, and NorthWestern Energy. None of those entities maintains any ownership in CCMC or The North American Coal Corporation. To the extent any of the power plant owners own any stock in NACCO, such ownership, if any, is nominal, and does not afford them any right of control over NACCO.
2. *Common control can be established if an entity such as a corporation has decision-making authority over the operations of a second entity through a contractual agreement or a voting interest.* The CCM and Coyote Station are operated by separate companies that do not have common decision making oversight. The Coyote Station owners do not have decision making authority over CCMC,

⁵ Letter from Stanley Krivo of US EPA Region 4 to Laura Burrell of the Mississippi Department of Environmental Quality.

⁶ 40 CFR § 52.21(b)(18).

⁷ 40 CFR § 52.21(b)(4) and § 52.21(k).

nor does CCMC have any authority over the plant or its operations. Operational decisions, at the mine and the power plant, are independently made. CCMC will sell lignite to the Coyote Station owners pursuant to a Lignite Sales Agreement (the Agreement). The Agreement anticipates a certain amount of coordination between the parties. For example, each year, the Coyote Station owners are supposed to notify CCMC of the estimated amount of lignite they expect to use in the upcoming year on a monthly basis. The estimates will enable CCMC to carry out its operations accordingly. Aside from that, all engineering, land, geological, operational, administrative, environmental permitting and compliance, managerial, and other work required to supply lignite for use at Coyote Station is the exclusive responsibility of CCMC. Reclamation work is also CCMC's exclusive responsibility. The Agreement further provides that CCMC is an independent vendor (as opposed to an "agent" or "servant"), and that the Agreement shall not "be construed to constitute or create a joint venture, trust, mining partnership, commercial relationship, fiduciary relationship or other relationship between" the parties. Given that the Agreement is "cost-plus," meaning that the Coyote Station owners will pay certain CCMC operating costs, the owners have the right to approve certain significant capital expenditures. They do not, however, exercise authority over the day-to-day mining operations: they don't hire or fire mine employees, make crew assignments, or establish work shifts. They do not schedule equipment. Nor do they direct pollution control activities at the mine-site, which, by the nature of the operation, are significantly different from pollution control activities at the power plant.

3. *Common control can be established if there is a contract-for-service relationship between the two entities or if a support/dependency relationship ("but for") exists between the two entities such that a common control relationship exists.* The Agreement is not exclusive in perpetuity, and during its existence the Agreement allows the Coyote Station owners to import and use fuels from other resources in certain situations. The Agreement also allows CCMC to mine and sell lignite to third parties so long as doing so will not impair CCMC's ability to meet its supply obligations to the Coyote Station owners under the Agreement. Also, the Coyote Station owners can terminate the Agreement under certain circumstances. The lack of a "but for" relationship is evidenced by the current situation at Coyote Station. Specifically, Dakota Westmoreland's Beulah Mine currently provides the vast majority of its mined lignite to Coyote Station. The mine, however, was opened in 1963 to serve other customers, and for the better part of eighteen years it operated without Coyote Station.⁸ When Coyote Station came on line in 1981, the mine expanded its operations to meet the plant's needs.⁹ Not only was the mine a viable operating entity before the plant existed, Dakota Westmoreland apparently intends to continue operating after its lignite sales agreement expires.¹⁰ In the same vein, the CCM intends to provide most of its lignite to Coyote Station, but under the lignite sales agreement with the Coyote Station owners the mine is able to serve other lignite users as well.

The aforementioned three factors are referenced in EPA's 1999 memorandum where they cite use of the Securities and Exchange Commission (SEC) definition of control as guidance. The SEC definition states:

Control means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person whether through the ownership of voting shares, contract or otherwise (17 CFR 240.12b-2).

⁸ <http://www.westmoreland.com/beulah>, accessed February 1, 2013.

⁹ <https://www.lignite.com/?id=71>, accessed February 1, 2013.

¹⁰ Bismarck Tribune article, November 4, 2012. "Bill Weaver, mine manager, said his company is evaluating other options after 2016 and thinks the Heskett contract is enough to keep the mine open."

A 2009 court case, *Winnebago Industries v. Iowa DNR*, reversed an Iowa Department of Natural Resources finding that co-located vehicle manufacturer and surface coating plants were a single stationary source based upon the court's emphasis on the SEC definition as compared to other broader questions that EPA has used for determining common control. In this decision, the court focused on the power of a company to direct or cause the direction of management and policies, as opposed to economic influences. As applied to this situation, the Coyote Station owners do not have specific power to direct the management of CCMC.

Other broader factors the EPA and state agencies with primacy have used in source determinations, and their applicability here, include the following.

- *What is the dependency of one facility on the other? Can a facility continue to operate if the other shuts down? If one shuts down, what are the limitations on the other to pursue outside business interests?* Coyote Station will receive a regular dependable supply of lignite from CCMC's mine. If CCMC is unable to carry out its obligations under the Agreement, CCMC is responsible for securing replacement fuel. Also, if the mine were to shut-down completely, the plant could still operate, as evidenced by the fact that it has been in operation since 1981, well before CCMC was formed. Additionally, CCMC's existence is not dependent on the Coyote Station plant. If supplies to the plant curtailed for any reason, CCMC could and would pursue lignite sales, or continue to sell lignite, to third parties. Lignite sales to third parties are specifically contemplated in the Agreement. Also, as noted above, the Dakota Westmoreland Beulah Mine that has supplied lignite to the Coyote Station was in operation 18 years before the power plant began operating, and apparently Dakota Westmoreland is considering plans to keep the mine open after its sales agreement expires in 2016.
- *Does one operation support the operation of the other? Do the facilities share intermediates, products, byproducts, or other manufacturing equipment?* While CCMC will provide lignite to Coyote Station, there will not be any sharing of equipment, facilities, products, or byproducts. Additionally, there shall be a clear delineation of when title to the lignite is transferred to Coyote Station for its handling and use under its existing air permit.
- *What are the contractual arrangements for providing goods and services? Can the new source purchase raw materials from and sell products or byproducts to other customers?* CCMC will supply lignite to Coyote Station under the Agreement. The Agreement allows CCMC to sell lignite to third parties if CCMC demonstrates that doing so will not impair CCMC's ability to meet its supply obligation. Similarly, the Agreement allows the Coyote Station owners to buy lignite from CCMC and then turn-around and sell it at a profit to third parties.
- *What are the financial arrangements between the two entities?* CCMC will invoice the Coyote Station owners on a monthly basis for its actual costs, plus a profit margin.
- *Do the facilities share equipment, other property, or pollution control equipment?* CCMC will own all of its own equipment, including pollution control equipment, and all other property. CCMC and the Coyote Station owners do not envision sharing any equipment.
- *What does the contract specify with regard to the pollution control responsibilities of the contractee?* The parties each have control over their own pollution control responsibilities. There is no overlap between the mine and the power plant. Although each has air and water permits, the permits are different in nature and are issued under separate categories for coal mining and power production.

- *Who accepts the responsibility for compliance with air quality control requirements? What about for violations of the requirements?* CCMC will be responsible for the operation of the proposed mine and is responsible for compliance with all air quality pollution control requirements. Legal liability for violations at the mine will fall exclusively on CCMC; the Coyote Station owners agreed to reimburse CCMC for financial penalties. CCMC has no responsibility for air quality control requirements at the plant, nor does it have any legal liability for any violations. The Coyote Station owners are responsible for air quality control requirements, and liability for such violations is between the owners.
- *Can the managing entity of one facility make decisions that affect pollution control at the other facility?* CCMC and Coyote Station would be operated by separate companies that do not make decisions regarding pollution control at each other's facilities.
- *Do the facilities share common workforces, plant managers, security forces, corporate executive officers, or board executives?* CCMC and Coyote Station do not share common workforces, plant managers, security forces, corporate executives, or board executives.
- *Do the facilities share common payroll activities, employee benefits, health plans, retirement funds, insurance coverage, or other administrative functions?* CCMC and Coyote Station do not share common payroll activities, employee benefits, health plans, retirement funds, insurance coverage, or other administrative functions.

Based on the information provided, CCMC and the Coyote Station owners are under separate control.

Industrial Grouping

The PSD and Title V programs provide that sources must belong to the same industrial grouping (two-digit SIC code) to be considered the same stationary source. This industrial grouping criterion was added as a third criterion in the 1980 PSD rule amendments¹¹ as a result of a Court of Appeals decision in *Alabama Power v. Costle*, in which the court rejected the definition of "source" in the 1978 PSD regulations.¹² An excerpt from the regulatory preamble that sets forth this criterion is provided below for context on applying the criterion to CCMC and Coyote Station.

After considering the comments of those who objected to the use of proximity and control only, EPA has decided to adopt for PSD purposes a definition of "building, structure, facility, and installation" that is different from the one it proposed in September. The final definition provides that those component terms each denote "all of the pollutant-emitting activities which belong to the same industrial grouping, are located on one or more contiguous or adjacent properties, and are under the control of the same person (or persons under common control). Pollutant-emitting activities shall be considered as part of the same industrial grouping if they belong to the same 'Major Group' (i.e., which have the same two-digit code) as described in the Standard Industrial Classification Manual, 1972, as amended by the 1977 Supplement (U.S. Government Printing Office stock numbers 4101-0066 and 003-005-00176-0, respectively)."

In EPA's view, the December opinion of the court in Alabama Power sets the following boundaries on the definition for PSD purposes of the component terms of "source": (I) it must

¹¹ 45 FR 52676-52748, August 7, 1980.

¹² *Alabama Power Co. v. Costle*, 636 F.2d 323 (D.C. Cir. 1979).

carry out reasonably the purposes of PSD; (2) it must approximate a common sense notion of "plant"; and (3) it must avoid aggregating pollutant-emitting activities that as a group would not fit within the ordinary meaning of "building," "structure," "facility," or "installation."

The comments on the proposed definition of "source" have persuaded EPA that the definition would fail to approximate a common sense notion of "plant," since in a significant number of cases it would group activities that ordinarily would be considered as separate. For instance, a uranium mill and an oil field would ordinarily be regarded as separate entities, yet the proposed definition would treat them as one.

In formulating a new definition of "source," EPA accepted the suggestion of one commenter that the Agency use a standard industrial classification code for distinguishing between sets of activities on the basis of their functional interrelationships. While EPA sought to distinguish between activities on that basis, it also sought to maximize the predictability of aggregating activities and to minimize the difficulty of administering the definition. To have merely added function to the proposed definition as another abstract factor would have reduced the predictability of aggregating activities under that definition dramatically, since any assessment of functional interrelationships would be highly subjective. To have merely added function would also have made administration of the definition substantially more difficult, since any attempt to assess those interrelationships would have embroiled the Agency in numerous, fine-grained analyses. A classification code, by contrast, offers objectivity and relative simplicity. (underlined for emphasis)

On the basis of using the two-digit classification code, CCM is a coal mine in SIC major group 12. Coyote Station generates electricity, which is in SIC major group 49. The major industrial groupings are different between CCM and Coyote Station.

In the same rule preamble, the EPA prescribed that the two-digit SIC code grouping should be assigned to the primary activity of the source. Pollutant-emitting activities that support the primary activity are labeled by the EPA as a "support facility." However, as stated by the EPA in the rule preamble below, CCM as a surface coal mine and Coyote Station as an electrical generator have separate primary activities. Whether the coal mine serves one customer or multiple customers is irrelevant to the industrial grouping criterion.

Each source is to be classified according to its primary activity, which is determined by its principal product or group of products produced or distributed, or services rendered. Thus, one source classification encompasses both primary and support facilities, even when the latter includes units with a different two-digit SIC code. Support facilities are typically those which convey, store, or otherwise assist in the production of the principal product. Where a single unit is used to support two otherwise distinct sets of activities, the unit is to be included within the source which relies most heavily on its support. For example, a boiler might be used to generate process steam for both a commonly controlled and located kraft pulp mill and plywood manufacturing plant. If the yearly boiler output is used primarily by the pulp mill, then the total emissions of the boiler should be attributed to the mill.

In adopting the new definition of "source," EPA rejected the requests of those commenters who thought that the proposed definition would not be inclusive enough. As noted above, they urged that EPA formulate a definition that looked only to proximity and function. But such a definition by looking to function would unnecessarily increase uncertainty and drain the Agency's

resources. In addition, such a definition would present groupings, such as the example the commenters gave, that would severely strain the boundaries of even the most elastic of the four terms, "building," "structure," "facility," and "installation."

EPA is unable to say precisely at this point how far apart activities must be in order to be treated separately. The Agency can answer that question only through case-by-case determinations. One commenter asked, however, whether EPA would treat a surface coal mine and an electrical generator separated by 20 miles and linked by a railroad as one "source," if the mine, the generator, and the railroad were all under common control. EPA confirms that it would not. First, the mine and the generator would be too far apart. Second, each would fall into a different two-digit SIC category. (underlined for emphasis)

The view that a coal mine and an electrical generating station are individual primary activities because these source categories are separate types of businesses, regardless of how much of the coal is provided to a given consumer, is further affirmed by the EPA in a new source applicability example in written guidance, excerpted below.¹³

In this example the proposed project is a new coal-fired electric plant. The plant will have two 600-MW lignite-fired boilers. The proposed location is near a separately-owned surface lignite mine, which will supply the fuel requirements of the power plant, and will therefore, have to increase its mining capacity with new equipment. The lignite coal will be mined and then transported to the power plant to be crushed, screened, stored, pulverized and fed to the boilers. The power plant has informed the lignite coal mine that the coal will not have to be cleaned, so the mine will not expand its coal cleaning capacity.

*...
The first step is to determine what constitutes the source (or sources). A source is defined as all pollutant-emitting activities associated with the same industrial grouping, located on contiguous or adjacent sites, and under common control or ownership. Industrial groupings are generally defined by two-digit SIC codes. The power plant is classified as SIC major group 49; the nearby mine is SIC major group 12. They are neither under the same SIC major group number nor have the same owners, so they constitute separate sources.*

The EPA occasionally has suggested a "but for" test to be used to determine if a support or dependency relationship exists between two entities, thus creating questions about the primary activity of a source or group of sources. Not only is that inconsistent with the EPA materials discussed above, but perhaps more importantly the "but for" test is nowhere to be found in the text of the regulation, which simply states that "[p]ollutant-emitting activities shall be considered as part of the same industrial grouping if they belong to the same Major Group . . . as described in the Standard Industrial Classification Manual." Because the implementing regulation is so clear, and because the regulation does not say anything about a "but for" test, it is unnecessary to look beyond the "industrial grouping" language in the regulation, or to effectively read into it a "but for" test or any other test that purports to analyze the extent to which the mine supports Coyote Station. In *Christensen v. Harris County*, for example, the Supreme Court ruled that a federal agency is bound to apply its unambiguous regulation as written, and that it may not, under the "guise of interpretation," supplement that regulation with other factors or additional requirements because doing so would effectively allow the agency "to create *de facto* a new regulation" without going through the notice

¹³ US EPA, "Draft NSR Workshop Manual, Prevention of Significant Deterioration and Nonattainment Area Permitting," October 1990.

and comment procedure.¹⁴ *Color Communications, Inc. v. Illinois Pollution Control Board* is also instructive. In that case, although the facilities in question had different SIC codes, the Pollution Control Board had ruled they were a single source since one facility supported the other. On appeal, the court reversed that finding, stating:

In this case the plain language of the statute, as set forth above, clearly requires that if several stationary sources have the same two-digit SIC code, they must be considered to belong to a single major industrial grouping. Accordingly, an industrial grouping is defined by SIC codes. A plain reading of this statute is that if several stationary sources do not have the same two-digit SIC code, they do not belong to the same industrial grouping.

*Where a statute is clear and unambiguous, as this one is, a court is not at liberty to depart from its plain language and meaning by reading into it limitations or conditions that the legislature did not express. . . By relying on the support-facility concept, the Board improperly looked beyond the unambiguous language of the statute to determine whether the two plants belonged to a single industrial grouping. Accordingly, the Board erred in concluding the plants constituted a "single source". . .*¹⁵

The bottom line is that the CCM and Coyote Station have separate industrial groupings and therefore constitute separate sources.¹⁶

Notwithstanding that such a relationship evaluation is functional in nature and was thus rejected already by EPA as a criterion in the 1980 PSD rulemaking, CCMC would satisfy such a test, as evidenced by the very situation in place at Coyote Station. As previously pointed out, Dakota Westmoreland's Beulah Mine currently provides the vast majority of its mined lignite to Coyote Station, and in fact has been doing so since 1981. The mine, however, was opened in 1963 and for eighteen years served other customers¹⁷ until its operations expanded substantially to satisfy Coyote Station, which came on-line in October 1981.¹⁸ Moreover, Dakota Westmoreland apparently intends to continue operating after its lignite sales agreement expires.¹⁹ In the same vein, CCM intends to provide most of its lignite to Coyote Station, but under its lignite sales agreement the mine is able to serve other lignite users as well.

Contiguous or Adjacent Properties

CCMC's mining operations constitute the "pollutant-emitting activities" stated in the definition above. The mining operations proper are located on property owned or maintained through leases and, at present, are over three miles from, and not contiguous or adjacent to, Coyote Station's property, as illustrated in Attachment 1. CCMC is currently evaluating different options for delivering the lignite from the mining operations proper to the Coyote Station. The lignite will be hauled by truck, conveyor, or similar haulage

¹⁴ 529 U.S. 576, 588 (2000).

¹⁵ 680 N.E. 2d 516, 533 (Ill. Ct. App. 1997), *petition for leave to appeal denied*, 686 N.E.2d 1159 (Ill. 1997).

¹⁶ Also, applying the "but for" test in the context of the SIC code criterion is unnecessary since, as noted already, the same test arises in connection with the common control criterion.

¹⁷ <http://www.westmoreland.com/beulah>, accessed February 1, 2013.

¹⁸ <https://www.lignite.com/?id=71>, accessed February 1, 2013.

¹⁹ Please see footnote 10, page 4.

system around the Dakota Westmoreland property that currently separates the CCM from the Coyote Station. The lignite will likely will be conveyed by belt conveyor across the property/permit boundary between the CCM and the Coyote Station with transfer of ownership of the lignite occurring during the conveyance.

As you probably know, the "contiguous or adjacent" criterion recently was litigated in the United States Court of Appeals for the Sixth Circuit.²⁰ In its August 2012 decision, the court held that facilities are "contiguous or adjacent" when they physically adjoin one another. Significantly, the court rejected the EPA's interpretation, which had emphasized "the functional interrelationship" of the facilities in question. *Summit Petroleum*, 690 F.3d at 742 ("The EPA makes an impermissible and illogical stretch when it states that one must ask the *purpose* for which two activities exist in order to consider whether they are adjacent to one another").²¹

Furthermore, consideration of facilities functional interrelationship in conjunction with physical adjacency is not warranted, since there is already a separate factor, industrial grouping, that is used to determine if multiple activities are engaged in the same type of business. Indeed, in the 1980 amendments to the PSD rules that added the industrial grouping criterion to the stationary source definition, EPA specifically had considered, requested comment on, and subsequently rejected a test of whether activities are sufficiently functionally related because it would be "would be highly subjective" and would make "administration of the definition substantially more difficult."²² Instead, the EPA elected to incorporate the new industrial grouping criterion, thereby allowing the factor of physical adjacency to be evaluated more clearly.

Although the EPA could have attempted to appeal the Sixth Circuit's decision in *Summit Petroleum* to the United States Supreme Court, it did not do so. Instead, the EPA issued internal correspondence that the determination of contiguous or adjacent properties in the Federal regulations will be applied differently between the States in the Sixth Circuit (Michigan, Ohio, Tennessee, Kentucky) and all other States, inasmuch as EPA has direct jurisdiction for areas in these States.²³ The *Summit Petroleum* case involved EPA's implementation of the PSD program on an Indian reservation in Michigan. The EPA does not operate the PSD program in North Dakota except for sources proposing to construct on Indian reservations. Instead, the NDDH operates its own EPA-approved PSD program under North Dakota Administrative Code Chapter 33-15-15 in all areas of North Dakota outside of Indian reservations.²⁴ CCMC is not located on an Indian reservation and is therefore subject to the purview of NDDH's permitting authority. Based on a review of case-by-case source aggregation decisions by the NDDH, it

²⁰ *Summit Petroleum Corp. v. United States EPA*, 690 F.3d 733 (6th Cir. 2012).

²¹ The Court also noted that the EPA's interpretation was not entitled to any deference since "contiguous or adjacent" is unambiguous.

²² 45 FR 52694-52695, August 7, 1980.

²³ December 21, 2012, US EPA Memorandum from Stephen D. Page to Regional Air Directors, "Applicability of the Summit Decision to EPA Title V and NSR Source Determinations."

²⁴ 40 CFR § 52.1829(a).

Mr. Terry O'Clair

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has consistently relied on physical proximity within the ordinary (i.e., physical and geographical) meaning of "adjacent."²⁵

Conclusion

The proposed Coyote Creek Mine has a separate major industrial grouping and is not under common control with the existing Coyote Station power plant. Accordingly, based on the application above of the legal criteria for determining the applicability of PSD, Section 112 air toxics, and Title V, we believe that the Coyote Creek Mine should be considered a separate stationary source from the existing permitted Coyote Station. Upon the NDDH's review and approval of this request, CCMC will complete the permit applicability analysis and submit an air quality permit to construct application to the NDDH.

Please contact me at 701-873-7227 or Joel Trinkle with Barr Engineering Company at 952-832-2870 if you would like any additional information or have any questions. We look forward to hearing from you regarding this project.

Sincerely,

COYOTE CREEK MINING COMPANY, L.L.C.

/S/

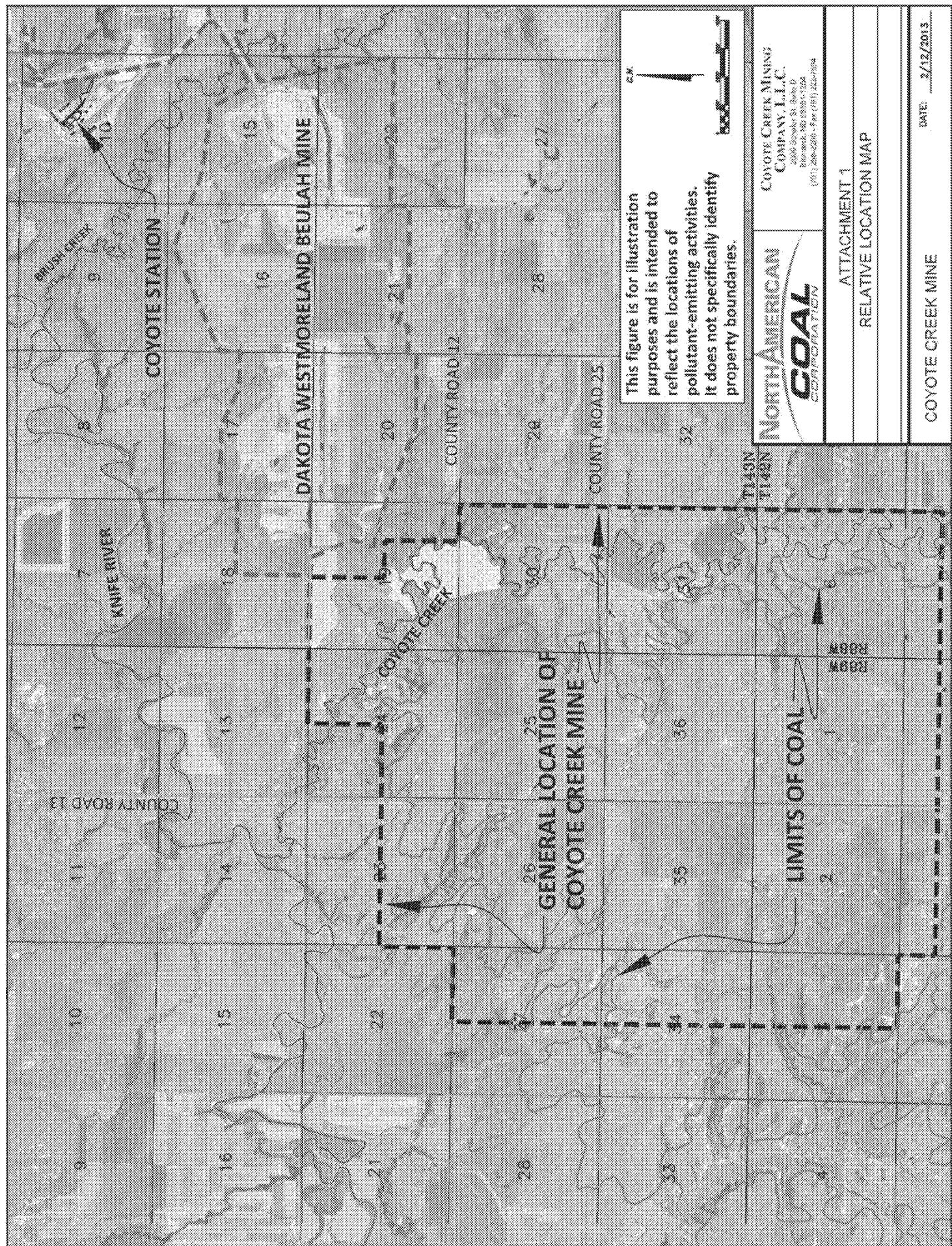
Donn R. Steffen
Environmental Manager

cc: Justin Burggraff
 Joel Trinkle, Barr Engineering Company

Attachment 1 – Map of the CCM/Coyote Station Site

Attachment 2 – EPA Letter to MDEQ

²⁵ Case in point, see the NDDH determinations: 1) May 12, 2005, regarding Coal Creek Station and Blue Flint Ethanol, 2) September 7, 2006, regarding Spiritwood Industrial Park, 3) October 14, 2011, regarding Enbridge Stations. All three determinations rely on the physical proximity of the separately owned properties for this criterion.



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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
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4APY-AEB

Ms. Laura L. Burrell
State of Mississippi
Department of Environmental Quality
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P.O. Box 10385
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Re: Secondary Emissions For PSD Air Quality Assessments
Choctaw Generating, Inc., Red Hills Generating Facility
Choctaw County, Mississippi

Dear Ms. Burrell:

This letter is in response to your request for documentation of our discussions concerning the modeling procedure to address the air quality impacts of secondary emissions for the proposed Red Hills Generating Facility (RHGF). Emissions from the RHGF will be greater than the Prevention of Significant Deterioration (PSD) major source emission level - the reason for the PSD application for the RHGF power plant. To provide fuel for the RHGF, a company not related to Choctaw Generating, Inc. will develop a lignite mine on adjacent property. Although no PSD permit is required for the mine's operation because its emissions are less than the PSD major limits, the mine's emissions are "secondary emissions" for the power plant and must be included in the impact assessment for RHGF (reference: New Source Review Workshop Manual, 1990, Section II.B.4).

Of concern to the MS Department of Environmental Quality (MSDEQ) in the air quality impact assessment is the location of receptors for the analysis of the mine's impact. PSD computer impact modeling of the power plant's emissions are performed at receptors located on non-power plant property (i.e., power plant ambient air defined as air nor over land owned or controlled by the plant with physical barriers precluding public access) which includes the mine property. MSDEQ's question in modeling the secondary mine emissions is whether the power plant "ambient air" is used for the mine's impact analysis (i.e., impact analysis of mine emissions at receptors located on the mine's property); or does the mine have its own ambient air defined by the mine's property boundary?

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To address the ambient air issue for secondary emissions, I have contracted both USEPA Regional 4 and OAQPS modelers as well as reviewed available USEPA documented guidance. Although no specific guidance document was available on this issue, all Regional and OAQPS individuals contacted agreed that PSD air quality impacts are not modeled on the property owned and controlled by the owner of the emission source. Therefore, secondary emissions from a separately owned and controlled mine should be modeled in ambient air for the mine. The modeling receptor grid for the mine should include properties outside the mine's property boundary which includes the power plant property.

I hope this letter satisfies your request for documentation of our discussions concerning ambient air impact modeling of secondary emissions for the Red Hills Generating Facility. Please let me know if you have further questions on this subject.

Sincerely,



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